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In RE:	**APPLICATION NO.:**	10/605,028
	DATE FILED:	September 2, 2003
	INVENTOR:	David M. Kuchar
	TITLE OF INVENTION:	FENCE TAPE
	CONFIRMATION NO.:	2027
	ATTORNEY DOCKET NO.:	51900-KUCHAR-001
	EXAMINER:	William P. Watkins III
	GROUP ART UNIT:	1772
	DATE OF OFFICE ACTION:	September 22, 2004

REPLY TO OFFICE ACTION

Dear Sir:

Your Office Action of September 22, 2004 is hereby acknowledged. In that non-final Office Action, the Examiner rejected all pending claims (*viz.*, 1-15) under 35 U.S.C. § 103(a) as being unpatentable over Lyons (AU 199226388 A1 - hereinafter Lyons) in view of Trueblood, *et.al.* (5,691,032 - hereinafter Trueblood). The examiner stated:

> *Lyons teaches the use of a tape with longitudinal slits that expand to form a safety barrier netting with top and bottom strands and cross members (Figure 2). The tape may be made of many different materials and used as an anti-bird barrier (page 4, lines 10-15 and page 5, lines 20-25). Trueblood, et.al. teaches the use of metal to make an anti-bird barrier (col. 2, lines 60-69). The instant invention claims a tape which expands into a fence barrier and which is made of metal. It would have been obvious to one of ordinary skill in the art to have made the sheet of Lyons out of metal in order to better deter birds because of the teachings of Trueblood, et. al.*

Claim 1 of the Present Application recites:

1. *A flexible web barrier having generally parallel edges, having substantially greater length than width, and capable of being rolled longitudinally, wherein:*

a) *the web is cut longitudinally to form slits at intervals, the slits defining linear members comprising at least a top strand and a bottom strand and a plurality of cross members; and,*
b) *the bottom strand is able to be displaced in relation to the top strand so as to increase the width of the barrier, leaving regular voids.*

Indeed, Lyons teaches the use of a tape with longitudinal slits that expand to form a safety barrier netting with top and bottom strands and cross members. Also, the barrier of Lyons is flexible. On the other hand, Trueblood teaches the construction of a rigid metal device with protruding sharp rigid fingers (or barbs) that is used to repel birds, thereby preventing them from "roosting or resting on building windows, roof ledges, and the like." This appears to be the only utility of the Trueblood device, since without the barbs, birds could land on the device. Trueblood teaches away from using his device for anything other than a bird repellant structure. Lyons teaches that his safety barrier may also be used as an anti-bird barrier. He states:

> *However, as mentioned at the outset, the netting can have other uses besides being a safety barrier. Thus it could be used as an anti-bird netting on horticultural crops and on fish forming ponds, or as an insect deterrant from vegetable and fruit crops. In these contexts, colourants can be incorporated into the netting, such as silver or white colourants which are known to repel aphids and white fly.*
>
> *Additionally, animal repellants could be incorporated into the netting during the manufacture of the material itself. An example of a non-toxic and environmentally acceptable repellant is SAVANA which is manufactured by The Savana Company, California, U.S.A. This product has an odour and taste which repels a wide range of animals without adversely affecting them.*[1]

Lyons creates his anti-bird barrier in a completely different manner. The Lyons barrier must be flexible. He teaches away from a rigid device. He creates his anti bird barrier by:

- surrounding the area to be protected with his flexible netting;
- using a colored material designed to discourage the birds from approaching; and/or,
- incorporating a chemical repellant to into the netting during manufacture of the material.

Therefore, although both Lyons and Trueblood teach creation of an anti-bird barrier, the two devices are completely incompatible. Nowhere is there a suggestion to combine Lyons and Trueblood.

The Present Application teaches a general-use netting barrier created from a web material, or roll of tape, having slits. Although the Present Application does not exclude using the netting as an anti-bird barrier, nowhere does it specifically mention such utility. The Trueblood device is rigid, and it has barbs. The invention taught by the Present Application is flexible, and it does not have barbs. Combining Lyons and Trueblood could never produce the invention of independent claim 1 nor of its dependent claims 2-15.

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[1] Lyons 5:20-29 and 6:1-4

Claim 11 is the only claim that recites a metallic substance. This claim depends from claim 8 that recites a readily detectable substance. Therefore, the purpose of fabricating the Present Invention from a flexible metal tape is to make the barrier detectable. The Present Application states:

> **[0005]** *... Metallic or other substances can be added through any other means such as vapor deposition, lamination, printing, printing of conductive inks, or co-extruded particulate matter to make the tape readily detectable.*

Although the barrier could be fabricated from a metal tape, such a tape would necessarily be very thin in order to maintain its flexibility (a necessary property). The Present Application rather teaches the exemplary embodiment that utilizes a metallic coating. If the barrier is buried underground, it can be detected using a metal detector or other device. Neither Lyons nor Trueblood teach this feature. Furthermore, the use of a metallic substance in the Present Invention produces a result unanticipated by either Lyons or Trueblood which is unexpected -- *i.e.*, detectability. Therefore, one skilled in the art at the time of filing of the Present Application would not have deemed it obvious to combine Lyons and Trueblood to produce the Present Invention. Therefore, the Examiner has failed to prove that the claim 1 of the Present Invention is unpatentable under 35 U.S.C. § 103(a) over Lyons in view of Trueblood. Consequently, since generic claim 1 is not obvious over Lyons combined with Trueblood, neither can dependent claims 2-15 be obvious over Lyons combined with Trueblood since these dependent claims contain all of the limitations of claim 1.

Therefore, the Applicant respectfully requests that the Examiner withdraw his rejection of claims 1-15 as unpatentable under 35 U.S.C. § 103(a) over Lyons in view of Trueblood.

The Present Application teaches a barrier that is deployable by unrolling and hanging the flexible tape across a region and then deploying a bottom strand in the longitudinal direction with respect to a top strand. A single motion deploys the barrier into a fence along its entire unrolled length. On the other hand, the Lyons invention requires the netting to be stretched transversely for deployment. To deploy the Lyons invention, one must pull down on the barrier a large number of times at various intervals along the longitudinal direction to create a fence that spans its entire unrolled length. This is a primary difference between the two inventions, and the difference is significant and unanticipated by Lyons. Therefore, in an effort to clarify what the Applicant regards as his invention, claim 1 is hereby amended. The Applicant respectfully requests allowance of claims 1-15.

Finally, the Examiner stated:

> *An issue of public use or on sale activity has been raised in this application. In order for the examiner to properly consider patentability of the claimed invention under 35 U.S.C. 102(b), additional information regarding this issue is required as follows: any information on public use or sale of the claimed invention before the instant filing date. This issue is raised due to the filing and*

abandonment of the 09/300,771 application several years previous to the instant application.

Accordingly, the Applicant submits herewith an Affidavit in which he states under pains and penalties of perjury that the Present Invention has never been disclosed to the public, has never been published in any printed publication, has never been on sale, and has never been in public use.

In preparing this reply to your Office Action, the Applicant has attempted to respond completely to all of the Examiners rejections and objections. However, should this reply be inadvertently incomplete, the Applicant requests the courtesy of an Advisory Action so that he may correct the deficiency. After reviewing this reply and the arguments herein, should the Examiner still not be convinced that the claims are allowable over the cited prior art, the Applicant requests an interview with the Examiner prior to the next Office Action. At that time, the Applicant would be prepared to work with the Examiner in order to bring the Present Application into a condition for allowance.

Thank you for your kind attention.

Respectfully submitted,

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